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No. 02-371

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

KEVIN LAMONT HICKS,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENT

JULIA M. CARPENTER
Counsel of Record
KALI N. BRACEY
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

Attorneys for Amicus Curiae DKT Liberty Project

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MOTION OF THE LIBERTY PROJECT FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

The DKT Liberty Project, through its undersigned counsel, respectfully moves this Court, pursuant to Rule 37.2(b) of the Rules of the Supreme Court, for leave to file the accompanying brief *amicus curiae* in support of Respondent, Kevin Lamont Hicks. Petitioner has consented to the submission of this brief, and its letter of consent has been filed with the Clerk of this Court. Counsel for Respondent, Commonwealth of Virginia, has refused to consent to the filing of this brief.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation that restricts individual civil liberties. Such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. The DKT Liberty Project is also particularly involved in defending the right to freedom from government restraint and interference, one of the most profound individual liberties and a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual.

This case implicates the fundamental right of each citizen to be free from government restraint and interference. It also implicates the ability of citizens to

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[1] Pursuant to Supreme Court rule 37.6, none of the parties authored the brief *amicus curiae* in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of the brief.

measure government restraint against the constitutional yardstick. Because of The DKT Liberty Project's strong interest in protecting citizens from government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

For the foregoing reasons, the DKT Liberty Project respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Respondent.

Respectfully submitted,

JULIA M. CARPENTER*
KALI N. BRACEY
JENNER & BLOCK, LLC
601 Thirteenth St., N.W.
Washington, DC 20005
(202) 639-6000

*Counsel of Record

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To The Supreme Court Of Virginia

BRIEF OF *AMICUS CURIAE* DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the foregoing Motion of The DKT Liberty Project for Leave to File Brief *Amicus Curiae* in Support of Respondent.

SUMMARY OF THE ARGUMENT

The Commonwealth of Virginia charged Kevin Hicks with trespassing when he entered the streets adjacent to the Whitcomb Court housing project after he had been denied permission to enter under a policy that vested total and unfettered discretion for such permission in a Housing Authority official. In defending against the trespass charge, Hicks argued that the no-entry without permission policy violated the First Amendment because it was overbroad. Although it never raised the issue in any of the courts below, the Commonwealth now argues to this Court that Hicks did not have standing to raise that defense and it offers a wholly new standing rule untried by any court to date.

Mr. Hicks had standing to raise the overbreadth of the trespass policy in his criminal defense. First, as a state court, the Virginia Supreme Court is not bound by federal constitutional and prudential standing requirements. Further, the standing in this case is a straightforward application of the overbreadth doctrine. Finally, the Commonwealth's proposed "bright-line" rule would allow unconstitutional statutes to chill speech longer and would curtail First Amendment freedoms.

ARGUMENT

I. KEVIN HICKS HAD STANDING TO DEFEND AGAINST A CRIMINAL PROSECUTION ON OVERBREADTH GROUNDS.

The Commonwealth's argument — raised for the first time ever in this proceeding — that Mr. Hicks lacked standing to raise the overbreadth of the policy resulting in his arrest for trespass is misplaced for two reasons. First, the Supreme Court of Virginia has the inherent authority to determine who has standing to raise what issues in courts within the Commonwealth. Second, even if Virginia were required to adhere to federal constitutional and jurisprudential requirements, it did so here.

A. Virginia Courts are Not Bound By Federal Constitutional Standing Considerations.

Under our federalist system, state courts are not bound by federal constitutional or jurisprudential standing requirements and can therefore define their own. This Court has "recognized often that the constraints of Article III do not apply to state courts, and accordingly state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when *they address issues of federal law*." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (emphasis added) (collecting cases). This Court's federal overbreadth doctrine is an exception to the *federal*

standing rules which do not bind the states.[1] Thus, it is well within a state's inherent authority to provide broader standing to raise a claim than the federal courts might allow.

These principles of comity and federalism have particular force in the context of criminal law, which has traditionally been the province of the states. *Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996); *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995); *Brecht v. Ambramson*, 507 U.S. 619, 635 (1993); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). States have the inherent authority to draft and implement their own criminal codes and procedures for arresting, detaining, and trying suspects, and for imposing significant sentences in cases of conviction. Of course, these laws and procedures cannot violate federal constitutional rights. Consequently, state courts "hold the initial responsibility for vindicating constitutional rights," *Isaac*, 456 U.S. at 128, and a state cannot provide less protection than the constitutional minimum. But if a state provides broader standing to raise constitutional claims than a federal court could, that fact is of no federal constitutional concern. *See State v. Ramos*, 463 U.S. 992, 1013-14 (1983) ("It is elementary that states are free to provide greater protections in their criminal justice system than the federal constitution requires.").

Here, although the Commonwealth never challenged standing, the Virginia Supreme Court clearly considered that

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[1] *See Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984) (noting that First Amendment justified "lessening of prudential limitations on standing").

Mr. Hicks had standing in Virginia courts to raise the defense that the policy that caused his arrest was overbroad. This result is consistent with a long line of Virginia cases in which criminal defendants have raised challenges that would vindicate the rights of third parties. *E.g., Stanley v. Norfolk*, 237 S.E.2d 799, 801 (Va. 1977) (recognizing that "when overbreadth impinges upon First Amendment guarantees, a person accused under the statute has standing to make a facial attack, even though his own speech or conduct was not constitutionally protected"); *Owens v. Commonwealth*, 179 S.E.2d 477 (Va. 1971) (members of property-damaging crowd arrested under state anti-riot statute had standing to raise overbreadth of statute that prohibited unlawful gatherings); *Perkins v. Commonwealth*, 402 S.E.2d 229, 232 (Va. Ct. App. 1991) (criminal defendant raised overbreadth when charged with threatening to burn a home and using obscene language to intimidate or harass); *Coleman v. City of Richmond*, 364 S.E.2d 239, 242 (Va. Ct. App. 1988) (criminal defendant had standing to raise overbreadth when charged with loitering for purposes of prostitution).

Nor is Virginia unique. Other state courts commonly permit criminal defendants to raise overbreadth claims when the conduct of the criminal defendants was not protected by the First Amendment. For example, the Supreme Court of Washington considered the First Amendment overbreadth claims of two criminal defendants who were prosecuted for trespassing at a public housing project. *City of Bremerton v. Widell*, 51 P.3d 733, 742 (Wash. 2002), *cert. denied*, 123 S. Ct. 497 (2002). Similarly, the Supreme Court of Iowa heard a First Amendment overbreadth challenge in a trespass case when the defendants trapped the school superintendent in his office and destroyed school property.

State v. Williams, 238 N.W.2d 302, 306 (Iowa 1976). A defendant in Indiana who was charged with trespass onto a college campus had standing to bring an overbreadth challenge against that statute in *Grody v. State*, 278 N.E.2d 280, 281-82 (Ind. 1972). And, the Court of Appeals of Texas permitted a defendant who had repeatedly entered the University of Texas campus without permission to raise an overbreadth challenge to the state's criminal trespass charge. *Bader v. State*, 15 S.W.3d 599, 603 (Tex. Ct. App. 2000).

Like these other state court decisions, the Virginia Supreme Court's decision allowing Mr. Hicks to raise his defense to a criminal charge brought in Virginia courts is not a "radical expansion" (Pet. Br. at 14) of anything. To the contrary, it is a decision made by a state court on a procedural issue that is consistent with many other states court decisions. Even if the Commonwealth's proposed new restrictions on standing had merit, there would be no basis to introduce a new standing test relating to *federal* jurisdiction in the context of this state criminal case.

B. Standing In This Case Is A Straightforward Application Of The Overbreadth Doctrine.

Even if Virginia could not determine for itself who would have standing to raise an issue in its courts, the Virginia Supreme Court's implicit decision that Mr. Hicks had standing is still entirely justified under long-accepted principles.

As this Court has repeatedly made clear, "the Court has altered its traditional rules of standing to permit – in the

First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that *his own conduct* could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick v. Oklahoma* 413 U.S. 601, 612 (1973) *quoting Dombroski v. Pfister*, 380 U.S. 479, 491 (1965) (emphasis added). And the purpose of allowing such standing is also clear:

> Litigants, therefore, are permitted to challenge a statute, not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick, 413 U.S. at 612 n.3. Thus, a primary purpose of the overbreadth doctrine is to allow a statute to be tested against the First Amendment sooner rather than later, so as to prevent speech from being chilled by the mere existence of a statute.[2]

In contrast, the Commonwealth seeks to allow the chilling effect of unconstitutional statutes to continue until some expression has been directly affected by the statute. Of course, if the Commonwealth can hold off such

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[2] *See Massachusetts v. Oakes*, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in part and dissenting in part) (noting chilling effect of overbroad statutes never challenged and of time elapsing before ones that are challenged are amended to come within constitutional bounds).

challenges long enough, it is likely to avoid the determination altogether since such a statute may effectively chill the expression necessary to test it. At bottom, then, the Commonwealth's proposal not only ignores, but undermines the purpose of the expanded standing rule. Thus, it is unsurprising that the Commonwealth cannot point to a single court that has even considered, much less adopted the novel and untried rule it proposes.

The effect of the proposed rule is to conflate *standing* to raise the claim with *success* on the claim. Thus, the Commonwealth essentially argues that those who might not succeed should not even be allowed to try. Indeed, it even claims that *Broadrick* envisioned this narrowing of the expanded standing that it recognized. Citing *Broadrick*, the Commonwealth claims that the "ability of a criminal defendant to *invoke* the overbreadth doctrine 'attenuates as the otherwise unprotected behavior that [the First Amendment] forbids the State to sanction moves from "pure speech" toward conduct. . . .'" Pet. Br. at 18, *quoting Broadrick*, 413 U.S. at 615 (emphasis added). But this claim seriously mischaracterizes *Broadrick*. Far from suggesting that those engaged in conduct, rather than speech, lacked the *standing* to raise the overbreadth issue, the Court quite clearly contemplated a sliding scale for weighing the *merits* of such claims, so that the farther removed from "pure speech" is the unprotected behavior at issue, the more difficult it may be to show that the statute reaches enough protected speech to justify invalidating it. The Court concluded that passage by saying, "to put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to

the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. *See also Munson,* 467 U.S. at 958-59 (1984) (rejecting state's argument that standing should be denied because plaintiff had not shown substantial overbreadth because argument went to merits, not standing).

Significantly, this case is a criminal case, not a declaratory judgment action or other civil cause. Given that the defendant faces definite criminal penalties, there are no concerns that this case does not involve actual injury or that the interests are insufficiently concrete to assure full development of the issues. Indeed, this Court routinely permits criminal defendants to raise overbreadth claims. *See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). Whether the Court actually finds that the statute is overbroad is another issue – it is not determinative of standing.

Here, Mr. Hicks was charged with trespassing at Whitcomb Court because he was there without permission which had been denied. But for the Housing Authority no-trespass policy, he could not have been so charged. And the Housing Authority's no-trespass policy certainly raises First Amendment issues. It required permission to be on the property for any reason, whether visiting family, communicating with residents, organizing tenant groups, leafleting, picketing, or protesting within Whitcomb Court. But the unfettered discretion that the Housing Authority manager exercised in granting or denying permission was the same whether the person sought permission for the "conduct" of visiting family, or the "speech" of leafleting.

Where a no-trespass policy is the basis for the arrest and charge of trespass, and where that policy implicates First Amendment interests, a criminal defendant has standing to raise the overbreadth of the policy in his defense.

II. THE COMMONWEALTH'S PROPOSED RESTRICTION ON STANDING TO RAISE OVERBREADTH AS A DEFENSE IN CRIMINAL CASES IS NOT JUSTIFIED.

The Commonwealth proposes that: "before a criminal defendant may be allowed to escape conviction by vindicating First Amendment rights of others, he must at least show (1) that *his own* conduct involved some sort of expressive activity, and (2) that his conduct falls within the particular prohibition that he challenges as overbroad." Pet. Br. at 25. (emphasis in original). This proposal would severely restrict current standing law and is poor policy.

A. The Proposed "Bright-Line" Rule Would Eviscerate the Overbreadth Doctrine.

The signature fact of the overbreadth doctrine is that the individual bringing the challenge does *not* have to be engaged in protected expression. *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999); *Munson Co.*, 467 U.S. 947 (1984); *Ferber*, 485 U.S. 747; *Broadrick*, 413 U.S. 601; *Gooding*, 405 U.S. 518; *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Aptheker v. Secretary of State*, 378 U.S.

500 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1961); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Smith v. California*, 361 U.S. 147 (1959); *Thornhill v. Alabama*, 310 U.S. 88 (1940). Nor has this Court ever required, or even suggested, that criminal defendants must be involved in some sort of expressive activity to raise overbreadth challenges. To the contrary, as discussed above, the Court has consistently noted that where conduct, rather than speech, is at issue, the claimant may have a harder time winning, not that the claimant would not have standing.[3] *Broadrick*, 413 U.S. at 615.

Allowing only those who have engaged in some expression, and only when that expression is precisely covered by the statute, to raise an overbreadth claim is to return to the general rule of Article III and non-First Amendment prudential standing requirements. Further, it would entirely vitiate the point of overbreadth standing — to allow potentially chilling statutes and policies to be tested under First Amendment analysis *before* they chill much speech.

In addition to extending the life of statutes that chill speech, the Commonwealth's "bright-line" rule would also allow civil litigants who face no penalties substantially more protection than criminal defendants who fact the loss of liberty. Certainly litigants can challenge an overly broad statute even before they engage in any protected activity or are ever charged with a crime. *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Watchtower*

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[3] *See infra* at § IB for a more detailed discussion.

Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002). Suppose the Housing Authority had a policy even the Commonwealth would admit was unconstitutional — it required permission to come onto the premises, but the policy guaranteed permission to anyone except Christian ministers who intended to pray. A civil litigant who had not been charged criminally could challenge the Housing Authority's policy. If she won, and the policy were invalidated, then the Commonwealth could not apply it to anyone. Those tried *before* such a civil suit would be convicted under the concededly unconstitutional policy, while those arrested after the suit for the very same conduct could not be convicted. Moreover, the policy would continue to chill speech. The constitutionality of a criminal conviction cannot depend on the vagaries of timing and of whether a civil litigant is willing to fund a lawsuit.

Finally, the Commonwealth has advanced not a single reason justifying its "bright-line rule" except to suppose that if the Court does not adopt it, "extreme" results will occur and government will be frustrated. But government frustration with the requirement to narrowly tailor restrictions on speech cannot justify changing the rules about who can complain about its failure to do so. In addition, the extreme results the Commonwealth posits do not turn on *standing*, they turn on fairly absurd predictions about success on the merits. For example, the Commonwealth suggests that if the Housing Authority's no-trespass policy is invalidated here, Virginia college dorms will be beset by vagrants. This brush is entirely too broad. A simple policy that prohibits non-students from trespassing *after hours* without permission for any reason, as the

Commonwealth posits, is simply a time, place or manner restriction that virtually any court would find to be consistent with the First Amendment.[4] So although the Commonwealth's vagrant would have standing to raise overbreadth, if he could articulate any protected speech the policy would restrict, he would be highly unlikely to succeed on the merits.

B. The Commonwealth's Proposed Rule Would Curtail First Amendment Freedoms.

In addition, the Commonwealth's bright-line rule would significantly undermine the purpose of the overbreadth doctrine. That doctrine permits criminal defendants to challenge the First Amendment rights of third parties to cut off the chilling effect of a statute, even when the claimant's conduct is not protected. But the Commonwealth's proposed rule, if adopted by the Court, would change all of that. It would prohibit criminal defendants from protecting the First Amendment rights of others and would therefore effectively intensify and prolong the chilling effect that this Court has long sought to prevent. As this Court observed in *Keyishian*, "[w]here statutes have an overbroad sweep . . . the hazard of loss or substantial

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[4] On the other hand, if the trespass policy also prohibited leafleting or religious discussion at any time, or required permission to do so at any time, based on unfettered discretion, that policy might indeed be subject to challenge by a vagrant (or a missionary) arrested for trespassing. Again, such a challenge would surely not succeed unless they could show substantial overbreadth relative to the legitimate sweep of the policy. If it did succeed, it would be because the policy impermissibly chills speech.

impairment of those precious rights may be critical, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589, 609 (1967).

Finally, the context of this case is significant. The Housing Authority policy here further increases the housing projects' social and political isolation. The structure and location of housing projects fosters isolation. *See* Peter Nicholas, *PHA Wins $25 Million to Raze S. Phila Towers*, Philadelphia Inquirer, Aug. 31, 1998 at A1 (outlining efforts to move public housing residents closer to the rest of the community); Gilbert Jimenez, *United Center Pushes Housing West*, Chic. Sun-Times, April 10, 1996 at 10 (describing efforts to alleviate the social isolation in public housing in Chicago). The isolation of housing project residents can keep them from gainful employment, quality schools, and fulfilling religious services. In addition, residents must submit to rules and regulations more onerous than those of individuals who live outside of the project. *See HUD v. Rucker*, 535 U.S. 125 (2002) (upholding leases for housing authority residents that permit eviction if drug activity occurs in the residence without the resident's knowledge). Against this backdrop, the City of Richmond has restricted access to those neighborhoods to only those who have permission based on unfettered discretion. Though drug-dealers may be discouraged from entering the premises, so will community activists, political candidates, family members, religious representatives, broom salesmen, and the many other common, even casual, communicators of city life. The overbreadth doctrine exists to insure that anyone affected by the policy can raise the interests of these

communicators so as to insure that those lines of communication are robust.

CONCLUSION

Because Virginia courts are not required to adhere to federal standing requirements in adjudicating state criminal law cases, and because the Virginia Supreme Court properly applied this Court's overbreadth jurisprudence, the DKT Liberty Project urges this Court to affirm the Supreme Court of Virginia's holding below, and to decline the invitation of the Commonwealth to significantly restrict standing to raise overbreadth claims.

Respectfully submitted,

JULIA M. CARPENTER*
KALI N. BRACEY
JENNER & BLOCK, LLC
601 Thirteenth St., N.W.
Washington, DC 20005
(202) 639-6000

*Counsel of Record